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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

DAVID GALCERAN and ED TEEL,
Petitioners,

VS.

EDWARD JOSEPH HARDING,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CITY OF VALLEJO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONERS DAVID GALCERAN AND ED TEEL

JOHN M. POWERS,
City Attorney
BRUCE REED GOODMILLER,*
Deputy City Attorney
555 Santa Clara Street
Vallejo, California 94590
(707) 648-4545
Attorneys for Amicus Curiae City of Vallejo

*COUNSEL OF RECORD

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

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Amicus curiae City of Vallejo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the proceeding on November 16, 1989.

INTEREST OF AMICUS CURIAE CITY OF VALLEJO

This Section 1983 statute of limitations case is of interest to all California cities. The Board of Directors of the League of Califor-

nia Cities has, therefore, recommended that all California cities support the petition for writ of certiorari in this matter.[1]

Amicus curiae City of Vallejo ("City") is a charter city located in Solano County, California. City is appellee in *Forrester v. Dart*, United States Court of Appeals for the Ninth Circuit No. 89-15723. The resolution of *Forrester* turns, in large part, on the applicability of California Government Code Section 945.3 to Section 1983 actions. In the district court, the Honorable Thelton E. Henderson granted the City's Rule 12(c) motion for judgment on the pleadings, ruling that the statute of limitations barred plaintiff's action. Since the plaintiff was not subject to the restriction of Section 945.3, he could not make use of its tolling clause. Plaintiff appealed to the Ninth Circuit; *Forrester* was briefed and awaiting oral argument when the decision below was issued on November 16, 1989.

The City desires to present arguments not raised below or in the petition for writ of certiorari. Foremost of these is the inconsistency of the decision below with decisions of this Court regarding the severability of statutes. The uncertainty engendered by the decision below regarding the time period for filing Section 1983 actions diminishes much of what this Court has accomplished in recent opinions concerning this subject..

For these reasons, amicus curiae City of Vallejo and the joining amici curiae respectfully pray that a writ of certiorari issue to review the decision below.

SUMMARY OF ARGUMENT

This Court has established a rule of severability when certain parts of a statute are unconstitutional. If the invalid part is severable under this Court's standard, then the constitutional portion may stand while the unconstitutional part falls. Where it

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[1] The following California cities have, as of this date, formally requested to join the City as amici curiae upon the recommendation of the League of California Cities Board of Directors and Legal Advocacy Committee: Cities of Alameda, Burlingame, Lafayette, Monterey, Moraga, Orinda, Pittsburg, Pleasant Hill, Turlock and Vacaville.

is not possible to separate the unconstitutional part from the rest, as here, the whole statute must fall. This Court has determined that partial invalidation is improper where it would be contrary to legislative intent. The key inquiry is whether the legislature would have passed the constitutional part of the statute had it known that the rest was invalid.

The decision below severed a California statute after holding a part of it unconstitutional under the Supremacy Clause. The Ninth Circuit did not apply the relevant rule, or even discuss severability, as it severed the statute. If the Ninth Circuit had applied this Court's rule regarding severability, the court would have determined that the statute is not severable. The statute must fall in its entirety because the California Legislature would not have enacted the valid part had it known that the rest would fail to pass Constitutional muster.

For this reason, as well as those stated in the petition for writ of certiorari, amicus curiae City of Vallejo respectfully requests that a writ of certiorari issue to review the decision below.

ARGUMENT

The Court Should Grant the Writ Because There Is A Conflict Between The Decision Below And Decisions Of This Court Concerning Severability Of Statutes

Where certain parts of a statute are held to be unconstitutional, the validity of the rest depends upon whether the Legislature intended the statute to be severable. If so, the objectionable portions are void, and the rest of the act is valid. Where, as here, to sustain the remaining valid portion would accomplish a result different from that intended by the California Legislature, the whole must be declared invalid. In this case, California Government Code Section 945.3 is invalid in its entirety as it applies to Section 1983 actions. To hold otherwise would accomplish a vastly different result from that intended by the California Legislature.

This Court's standard for determining the severability of an unconstitutional provision focuses on the intent of the legislature.

"Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature has passed an inseverable Act or would not have passed it had it known the challenged provision was invalid." *Brockett v. Spokane Arcades, Inc.*, 472 US 491, 506 (1985). The Court was addressing, as here, the standard for a federal court to apply when considering the severability of a state statute.

The Court explained that "[t]his standard is similar to that which we would apply in determining the severability of a federal statute: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Brockett*, supra, at p. 506, fn 15, citing *Buckley v. Valeo*, 424 US 1, 108-109 (1976), quoting *Champlin Refining Co. v. Corporation Comm'n.*, 286 US 210, 234 (1932). This Court's standard for determining the severability of an unconstitutional provision is well established: it is largely a question of legislative intent. *See Alaska Airlines, Inc. v. Brock*, 480 US 678, 684 (1987); *Regan v. Time, Inc.*, 468 US 641, 653 (1984). Thus, the applicable standard for severability has been clearly articulated.

It is indisputable that the decision below severed California Government Code Section 945.3. "Accordingly, as applied here, the prohibition in paragraph 1 of section 945.3 must fall under the Supremacy Clause. . . . It does not necessarily follow that the one-year statute of limitations for Section 1983 actions should not be tolled by the tolling rule expressed in Section 945.3. . . . Therefore, the tolling provision does not fall under the Supremacy Clause and should have been applied to Harding's Section 1983 claims against the Deputies." *Harding v. Galceran*, 889 F2d 906 (9th Cir. 1989). (Appendix A, p. A-6 of petition for writ of certiorari.)

It is equally indisputable that the Ninth Circuit did not apply this Court's rule regarding severability. The court below did not even discuss the issue of severability. The City respectfully submits that the failure to apply this Court's standard for determining severability renders the decision below fatally defective. A

writ of certiorari should, therefore, issue to review the decision below.

If the Ninth Circuit had applied this Court's standard for determining severability, Section 945.3 would undoubtedly have fallen in its entirety. As set forth above, the relevant inquiry is legislative intent. "The legislative history established that the purpose of Section 945.3 was 'to eliminate the use of civil damage complaints as plea bargaining levers.' [*Mohlmann v. City of Burbank*, 129 Cal.App.3d 1037, 1043 (1986), quoting Assembly Office of Research Mem. dated July 10, 1981.] The Legislature concluded that many criminal defendants filed frivolous suits against officers involved in their prosecution and then used the suits as bargaining chips in plea negotiations." *McAlpine v. Superior Court*, 209 Cal.App.3d 1 (1989). Section 945.3 was designed to eliminate this problem, not to give civil rights plaintiffs more time to file. Section 945.3 was also intended to prevent the use of false arrest suits as a device to inquire into prosecutorial materials and investigative information while the criminal charge is pending. *Mohlmann*, supra at p. 1042; *McMartin v. County of Los Angeles*, 202 Cal.App.3d 848 (1988).

The California Legislature's intent is evident. The Legislature would not have enacted the provision suspending the running of the statute of limitations independent of the temporary denial of access to court. The two provisions are inextricably intertwined, with the former entirely dependent on the latter. There is absolutely no evidence nor any reason to believe that the Legislature intended to give Section 1983 plaintiffs more time to file their complaints. To the contrary, the California Legislature's intent was to limit mischievous lawsuits by criminal defendants. Section 945.3 was intended to further local government's interest in protecting itself from liability and its processes from interference.

The California Legislature's intent is also clear with respect to tolling. The relevant California tolling doctrine is found in California Code of Civil Procedure Section 352. *Hardin v. Straub*, ____ U.S. ____, 104 L.Ed 2d 582, 589, fn 8 (1989). A separate and distinct coordinate tolling rule is not to be found in a subsection of the California Tort Claims Act. Any other conclusion is plainly inconsistent with the intent of the California

Legislature. The tolling subsection of Section 945.3 was not intended by the Legislature to be California's coordinate tolling rule. Rather, this subsection was intended to have a narrow and specific purpose: to provide those persons temporarily barred by Section 945.3 from bringing state law claims with additional time to file them.

The first published opinion considering this issue observed that the plaintiff "appears to maintain that the tolling clause contained in Section 945.3 constitutes a distinct tolling rule upon which he may rely, notwithstanding the Court's holding that Section 945.3 does not apply to this action. The argument is unsound . . . plaintiff may not prevail upon Section 945.3's tolling clause without having been subject to its disabilities. To hold otherwise would permit words and phrases to be plucked from statutes as if they existed in a vacuum." *Mangels v. City of Orange,* 678 F.Supp. 1452, 1455 (C.D. Cal. 1988). Judge Rea found support for this position from Judge Learned Hand: "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Mangels,* supra, citing *NLRB v. Federbush Co., Inc.,* 121 F.2d 954, 957 (2nd Cir. 1941).

The City agrees with the Ninth Circuit to the extent that Section 945.3 must fall under the Supremacy Clause. The whole statute, however, must fall rather than merely one nonseverable part. The decision below is analytically unsound and inconsistent with the dictates of this Court.

CONCLUSION

California Government Code Section 945.3 is not severable. The decision below is inconsistent with decisions of this Court regarding severability of statutes. The Ninth Circuit has created needless uncertainty in an area where this Court has spoken recently in an effort to establish certainty. For these reasons and those in the petition for writ of certiorari, amicus curiae City of Vallejo respectfully requests that a writ of certiorari issue to review the decision below.

DATED: June 8, 1990

Respectfully submitted,

JOHN M. POWERS,
City Attorney

BRUCE REED GOODMILLER,*
Deputy City Attorney

Attorney for Amicus Curiae
City of Vallejo

*Counsel of Record